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9 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 BARBARA LEWIS, AKEMI
12 BUCKINGHAM, BOBBIE JOE HULING,
13 CYNTHIA WHETSELL, MARTHA MERLE,
14 ELAINA HUFNAGEL, TERESA GATTUSO,
ELISSA WAGNER, and DIXIE WILLIAMS,
15 individually and on behalf of all others
similarly situated,

16 Plaintiffs,

17 vs.

18 RODAN & FIELDS, LLC, a California
19 limited liability,

20 Defendant.

Case No. 4:18-cv-02248-PJH
(Consol. with No. 4:18-cv-02505-PJH)

**DEFENDANT'S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS PLAINTIFFS'
CONSOLIDATED COMPLAINT**

Assigned To: Judge Phyllis J. Hamilton

Hearing Date: February 20, 2019

Hearing Time: 9:00 a.m.

Courtroom: 3—3rd Floor

Action Filed: April 13, 2018

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. PLAINTIFFS HAVE NOT IDENTIFIED ANY INJURY-IN-FACT CAUSED BY R+F AND THEREFORE LACK ARTICLE III AND STATUTORY STANDING.....	1
A. Plaintiffs Do Not Claim that Lash Boost Caused Their Irritation.....	1
B. Plaintiffs Have Not Suffered Any “Economic Injury”.....	2
C. Plaintiffs’ Alleged Economic Injuries Are Not Traceable to R+F.....	3
D. The Out-of-State Plaintiffs’ Newly Asserted Price Premium Theory Should Be Disregarded	5
III. PLAINTIFFS FAIL TO STATE A CLAIM	6
A. Plaintiffs Do Not Satisfy Rule 9’s Heightened Standards.....	6
1. Plaintiffs Do Not Allege the Circumstances of their Alleged Deception	6
2. Plaintiffs Fail to Allege a Plausible Scientific Basis for Their Claim that Lash Boost Causes “Serious Side Effects”	7
B. The California Plaintiffs Fail to State a Claim.....	8
1. R+F Did Not Fail to Disclose Anything It Had a Duty to Disclose.....	8
2. Plaintiffs Fail to Allege Facts Showing that R+F Acted with Scienter.....	9
3. Plaintiffs Fail to Allege that They Lack an Adequate Remedy at Law, Thus Requiring Dismissal of Their UCL and FAL Claims	10
4. The California Common Law Fraud Claims Fail for Additional Reasons ..	11
C. The Out-of-State Plaintiffs Have Not Stated a Claim Under Their States’ Consumer Protection Laws	11
1. Huling Has Not Stated a Claim Under the FDUTPA.....	11
2. Whetsell Has Not Stated a Claim Under the ICFA.....	12
3. Merle Has Not Stated a Claim Under Chapter 93(A)	13
4. Hufnagel, Gattuso, and Wagner Do Not State a New York GBL Claim....	14
5. Williams Has Not Stated a Claim Under the Washington CPA	15
6. Plaintiffs Fail to State Common Law Claims Under Florida, Massachusetts, New York, Washington, or Illinois Law	15

1	IV.	PLAINTIFFS CANNOT SALVAGE THEIR RICO CLAIM	15
2	A.	Plaintiffs’ New Overpayment Theory Cannot Establish Standing under RICO	16
3	B.	Plaintiffs Have Not Shown Proximate Causation	17
4	C.	Routine Commercial Activity Is Not a Criminal Enterprise	18
5	D.	Plaintiffs Fail to Allege a Scheme to Defraud.....	19
6	V.	THIS COURT SHOULD DENY LEAVE TO AMEND	20

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	1
<i>Azoulai v. BMW of N.A., LLC</i> , 16-CV-00589-BLF, 2017 WL 1354781 (N.D. Cal. Apr. 13, 2017).....	2
<i>Bates v. United Parcel Serv., Inc.</i> , 511 F.3d 974 (9th Cir. 2007).....	3
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	1
<i>Birdsong v. Apple Inc.</i> , 2008 WL 7359917 (N.D.Cal. June 13, 2008), <i>aff'd</i> , 590 F.3d 955.....	2
<i>Birdsong v. Apple, Inc.</i> , 590 F.3d 955 (9th Cir. 2009).....	1, 2
<i>Boysen v. Walgreen Co.</i> , 11cv06262-SI, 2012 WL 2953069 (N.D. Cal. July 19, 2012)	2, 8, 9
<i>Catalano v. BMW of N. Am., LLC</i> , 167 F. Supp. 3d 540 (S.D.N.Y. 2016).....	14
<i>Cohen v. Trump</i> , 303 F.R.D. 376 (S.D. Cal. 2014).....	16, 17
<i>Cold Stone Creamery, Inc. v. Lenora Foods I, LLC</i> , 332 F. App'x 565 (11th Cir. 2009).....	12
<i>Community Bank of Trenton v. Schnuck Markets, Inc.</i> , 887 F.3d 803 (7th Cir. 2018).....	4
<i>Contreras v. Toyota Motor Sales U.S.A. Inc.</i> , 484 F. App'x 116 (9th Cir. 2012).....	2
<i>Corral v. Carter's Inc.</i> , 1:13-CV-0262 AWI, 2014 WL 197782 (E.D. Cal. Jan. 16, 2014)	8
<i>Crichton v. Golden Rule Ins. Co.</i> , 576 F.3d 392 (7th Cir. 2009).....	18

1	<i>DaCorta v. AM Retail Group, Inc.</i> ,	
2	16-CV-01748 (NSR), 2018 WL 557909 (S.D.N.Y. Jan. 23, 2018)	5, 12, 14
3	<i>Edlow v. RBW, LLC</i> ,	
4	688 F.3d 26 (1st Cir. 2012)	13
5	<i>Ehrlich v. BMW of N.A., LLC</i> ,	
6	801 F. Supp. 2d 908 (C.D. Cal. 2010).....	4
7	<i>Ferreira v. Sterling Jewelers, Inc.</i> ,	
8	130 F. Supp. 3d 471 (D. Mass. 2015)	13
9	<i>Fisher v. Monster Beverage Corp.</i> ,	
10	125 F. Supp. 3d 1007 (C.D. Cal. 2013), <i>aff'd in relevant part</i> , 656 F. App'x 819	
11	(9th Cir. 2016)	2
12	<i>Foman v. Davis</i> ,	
13	371 U.S. 178 (1962)	20
14	<i>Frye v. L'Oreal USA, Inc.</i> ,	
15	583 F. Supp. 2d 954 (N.D. Ill. 2008)	5, 8
16	<i>Gardner v. Safeco Ins. Co.</i> ,	
17	2014 WL 2568895 (N.D. Cal. June 6, 2014)	11
18	<i>Garner v. Healy</i> ,	
19	184 F.R.D. 598 (N.D. Ill. 1999)	17
20	<i>Goldemberg v. Johnson & Johnson Consumer Cos.</i> ,	
21	8 F. Supp. 3d 467 (S.D.N.Y 2014).....	14
22	<i>Gomez v. Guthy-Renker, LLC</i> ,	
23	Case No. EDCV 14-01425 JGB, 2017 WL 4270042 (C.D. Cal. July 13, 2015)	16, 18
24	<i>Hall v. Sea World Ent., Inc.</i> ,	
25	3:15-CV-660-CAB, 2015 WL 9659911 (S.D. Cal. Dec. 23, 2015).....	7
26	<i>Herrington v. Johnson & Johnson Consumer Cos.</i> ,	
27	09cv1597-CW, 2010 WL 3448531 (N.D. Cal. Sept. 1, 2010).....	8, 9, 14
28	<i>Hill v. Hoover Co.</i> ,	
	899 F. Supp. 2d 1259 (N.D. Fla. 2012).....	12
	<i>In re Carrier IQ, Inc.</i> ,	
	78 F. Supp. 3d 1051 (N.D. Cal. 2015)	4
	<i>In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.</i> ,	
	295 F. Supp. 3d 927 (N.D. Cal. 2018)	16, 17
	<i>In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.</i> ,	
	277 F.R.D. 586 (S.D. Cal. 2011).....	17

1	<i>In re Facebook Advertising Litig.</i> ,	
2	No. 5:09-cv-03043, 2010 WL 3341062 (N.D.Cal. Aug. 25, 2010)	6
3	<i>In re Fruit Juice Prods.</i> ,	
4	831 F.Supp.2d 507 (D.Mass.2011)	8, 9, 13
5	<i>In re Johnson & Johnson Talcum Powder Products Mktg., Sales Practices and</i>	
6	<i>Liab. Litig.</i> ,	
7	903 F.3d 278 (3d Cir. 2018).....	6
8	<i>In re Porsche Cars N. Am., Inc.</i> ,	
9	880 F. Supp. 2d 801 (S.D. Ohio 2012).....	14
10	<i>In re TJX Cos. Retail Sec. Breach Litig.</i> ,	
11	246 F.R.D. 389 (D. Mass. 2007)	13
12	<i>Izquierdo v. Mondelez Int’l, Inc.</i> ,	
13	No. 16-CV-04697 (CM), 2016 WL 6459832 (S.D.N.Y. Oct. 26, 2016)	14
14	<i>Jubiler v. MasterCard International</i> ,	
15	68 F. Supp. 2d 1049 (W.D. Wisc. 1999).....	18
16	<i>Justice v. Rheem Mfg.</i> ,	
17	318 F.R.D. 687 (S.D. Fla. Apr. 27, 2016).....	4
18	<i>Kearns v. Ford Motor Co.</i> ,	
19	567 F.3d 1120 (9th Cir. 2009).....	6
20	<i>Kennedy v. Jackson Nat’l Life Ins. Co.</i> ,	
21	No. C 07-0371 CW, 2010 WL 2524360 (N.D. Cal. June 23, 2010)	17
22	<i>Lassen v. Nissan N.A., Inc.</i> ,	
23	211 F.Supp.3d 1267 (C.D.Cal. 2016).....	2
24	<i>Leppert v. Champion Petfoods USA Inc.</i> ,	
25	Case No. 18 C 4347, Dkt. 33 (N.D. Ill. Jan. 16, 2019)	8, 9
26	<i>Lombardo v. Johnson & Johnson Consumer Cos.</i> ,	
27	124 F. Supp. 3d 1283 (S.D. Fla. 2015).....	12
28	<i>Maple v. Costco Wholesale Corp.</i> ,	
	649 Fed. Appx. 570, 572 (9th Cir. 2016)	5
	<i>Marolda v. Symantec Corp.</i> ,	
	672 F. Supp. 2d 992 (N.D. Cal. 2009)	6
	<i>Mass. Laborers’ Health & Welfare Fund v. Philip Morris, Inc.</i> ,	
	62 F. Supp. 2d 236 (D. Mass. 1999)	13
	<i>McVicar v. Goodman Global, Inc.</i> ,	
	1 F. Supp. 3d 1044 (C.D. Cal. 2014).....	4

1	<i>Moss v. Infinity Ins. Co.,</i>	
2	197 F. Supp. 3d 1191 (N.D. Cal. 2016)	11
3	<i>Mullins v. Premier Nutrition Corp.,</i>	
4	No. 13-CV-01271-RS, 2018 WL 510139 (N.D. Cal. Jan. 23, 2018)	10
5	<i>Munning v. The Gap, Inc.,</i>	
6	2017 WL 2377867 (N.D. Cal. June 1, 2017)	11
7	<i>Nguyen v. Nissan N. Am.,</i>	
8	2017 WL 1330602 (N.D. Cal. Apr. 11, 2017)	11
9	<i>Nordyke v. King,</i>	
10	644 F.3d 776 (9th Cir. 2011)	20
11	<i>Orshan v. Apple Inc.,</i>	
12	5:14-CV-05659-EJD, 2018 WL 5858643 (N.D. Cal. Nov. 6, 2018)	7
13	<i>Pardini v. Unilever U.S., Inc.,</i>	
14	961 F. Supp. 2d 1048 (N.D. Cal. 2013)	4
15	<i>Philips v. Ford Motor Co.,</i>	
16	2015 WL 4111448 (N.D. Cal. July 7, 2015)	10
17	<i>Phillips v. Apple Inc.,</i>	
18	15-CV-04879-LHK, 2016 WL 1579693 (N.D. Cal. Apr. 19, 2016)	3
19	<i>Rhynes v. Stryker Corp.,</i>	
20	2011 WL 2149095 (N.D. Cal. May 31, 2011)	11
21	<i>Robins v. Global Fitness Holdings, LLC,</i>	
22	838 F. Supp. 2d 631 (N.D. Ohio 2012)	18
23	<i>Robinson v. C.R. Bard, Inc.,</i>	
24	2016 WL 3361825 (N.D. Cal. June 17, 2016)	11
25	<i>Rodi v. S. New Eng. Sch. of L.,</i>	
26	532 F.3d 11 (1st Cir. 2008)	5, 13
27	<i>Sabo v. Wellpet LLC,</i>	
28	250 F. Supp. 3d 332 (N.D. Ill. 2017)	12
	<i>Salas v. Toyota Motor Sales, U.S.A., Inc.,</i>	
	2016 WL 7486600*14 (C.D. Cal. Sept. 27, 2016)	10
	<i>Simpson v. California Pizza Kitchen, Inc.,</i>	
	989 F. Supp. 2d 1015 (S.D. Cal. 2013)	2
	<i>Smith v. LG Elecs.,</i>	
	No. C 13-4361 PJH, 2014 WL 989742 (N.D. Cal. Mar. 11, 2014)	10

1	<i>Summit Estate, Inc. v. Cigna Healthcare of CA, Inc.</i> ,	
2	2017 WL 4517111 (N.D. Cal. Oct. 10, 2017)	11
3	<i>Weiner v. Snapple Beverage Corp.</i> ,	
4	No. 07 CIV. 8742 DLC, 2011 WL 196930 (S.D.N.Y. Jan. 21, 2011)	14
5	<i>Williamson v. Reinalt-Thomas Corp.</i> ,	
6	No. 11-3548, 2012 WL 1438812 (N.D. Cal. Apr. 25, 2013)	4
7	<i>Woods v. Maytag Co.</i> ,	
8	807 F. Supp. 2d 112 (E.D.N.Y. 2011)	14
9	California Cases	
10	<i>Alliance Mortg. Co. v. Rothwell</i> ,	
11	10 Cal. 4th 1226 (1995)	11
12	<i>In re Tobacco II Cases</i> ,	
13	46 Cal. 4th 298 (2009)	2
14	<i>Prudential Home Mortg. v. Superior Court</i> ,	
15	66 Cal. App. 4th 1236 (1998)	10
16	<i>Stout v. Turney</i> ,	
17	22 Cal.3d 718 (1978)	11
18	Other State Cases	
19	<i>Avery v. State Farm Mut. Auto. Ins.</i> ,	
20	835 N.E.2d 801 (Ill. 2005)	13
21	<i>Bellermann v. Fitchburg Gas & Elec. Light Co.</i> ,	
22	54 N.E.3d 1106 (Mass. 2016)	13
23	<i>Burkhart v. Wolf Motors of Naperville, Inc. ex rel. Toyota of Naperville</i> ,	
24	61 N.E.3d 1155 (Ill. Ct. App. 2016)	12
25	<i>Collins v. DaimlerChrysler Corp.</i> ,	
26	894 So. 2d 988 (Fla. 5th Dist. App. 2004)	12
27	<i>Deegan v. Windermere Real Estate/Center-Isle, Inc.</i> ,	
28	391 P.3d 582 (Wash. Ct. App. 2017)	15
	<i>Gale v. Int’l Bus. Machines Corp.</i> ,	
	781 N.Y.S.2d 45 (2nd Dep’t 2004) (GBL)	4
	<i>Gomez-Jimenez v. N.Y. Law Sch.</i> ,	
	36 Misc. 3d 230 (Sup. Ct. N.Y. Cty. 2012)	14
	<i>Goshen v. Mut. Life Ins. Co. of New York</i> ,	
	98 N.Y.2d 314 (2002)	15

1	<i>Makaryan v. Volkswagen Grp of Am., Inc.</i> ,	
2	17cv5086-PA, 2017 WL 6888254 at*5 (C.D. Cal. Oct. 13, 2017)	2
3	<i>Underwood v. Risman</i> ,	
4	605 N.E.2d 832 (Mass. 1993)	14
5	California Statutes	
6	Cal. Bus. & Prof. Code	
7	§ 17204.....	3
8	Other State Statutes	
9	815 Ill. Comp. Stat. Ann. 505/10a.....	13
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1 **I. INTRODUCTION**

2 Plaintiffs' Complaint does not allege, nor does their Opposition argue, that Lash Boost
3 *caused* them to experience possible side effects not disclosed on R+F's labels. Nor do they claim
4 to have read the warnings they admit that R+F gave, or explain why they would have seen
5 additional disclosures if they had been given. Their Opposition, like their Complaint, does not
6 identify a scientific basis for their claim that Lash Boost can cause the side effects which they
7 contend that R+F failed to disclose. They do not explain why reasonable consumers would care
8 about side effects associated with Lash Boost's ingredients, but not associated with Lash Boost.

9 Recognizing their failure to plead critical evidentiary facts, Plaintiffs' Opposition
10 repeatedly asks the Court to "infer" allegations that do not exist. Opp. at 9, 10, 16, 21, 25, 31, 34.
11 "A claim has facial plausibility when the pleaded factual content allows the court to draw the
12 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,
13 556 U.S. 662 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (cited in
14 Opp. at 8). Although a Court may draw "reasonable" legal inferences from facts appearing in the
15 complaint, it has no power to infer facts that a plaintiff has not pled. This Court should dismiss
16 Plaintiffs' Complaint. Plaintiffs lack standing and have failed to state a claim.

17 **II. PLAINTIFFS HAVE NOT IDENTIFIED ANY INJURY-IN-FACT CAUSED BY**
18 **R+F AND THEREFORE LACK ARTICLE III AND STATUTORY STANDING**

19 Article III and each cause of action require each Plaintiff to demonstrate the existence of
20 an injury-in-fact caused by R+F. *See, e.g. Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 (9th Cir.
21 2009). They have failed to do so.

22 **A. *Plaintiffs Do Not Claim that Lash Boost Caused Their Irritation***

23 Plaintiffs claim that they "developed a side effect *consistent with* the scientific literature on
24 *prostaglandin analogs*." Opp. at 12 (emphasis added); *see also id.* at 6. This allegation, which
25 describes correlation, does not demonstrate causation. Plaintiffs argue that "some" of the
26 Plaintiffs experienced serious side effects (Opp. at 5 & n.2), but others allege nothing more than
27 irritation (*see, e.g. CC* ¶ 31, 52)—which they admit that R+F does warn about (*id.* ¶¶ 100, 106,
28 107)—and none of the Plaintiffs claim to have experienced droopy eyelids, inflammation of the

1 iris or ciliary body, reactivate herpes, corneal scarring, increased prominence of lid vessels, or any
2 pregnancy-related issues. Standing is individual, not collective—each Plaintiff has the burden of
3 pleading that Lash Boost caused her an actual injury. *In re Tobacco II Cases*, 46 Cal. 4th 298, 319
4 (2009). Without an allegation of causation, *none* of Plaintiffs’ allegations support standing.

5 ***B. Plaintiffs Have Not Suffered Any “Economic Injury”***

6 Plaintiffs disavow that eye irritation constitutes their injury. Instead, their alleged injury
7 rests on their allegation that they would not have bought Lash Boost if R+F had disclosed its
8 purported risks. Opp. at 6 (“the relevant injury in fact is not the side effects themselves but the
9 money they spent on a product that failed to warn them of the side effects.”) Thus, “the Court
10 must evaluate whether Plaintiffs have alleged facts showing injury-in-fact derived from those
11 [economic] theories,” rather than from Plaintiffs’ alleged physical injuries. *Azoulai v. BMW of*
12 *N.A., LLC*, 16-CV-00589-BLF, 2017 WL 1354781 *4 (N.D. Cal. Apr. 13, 2017).

13 Countless federal courts in recent years have dismissed for lack of standing “no-injury”
14 products cases brought as consumer deception claims—cases where plaintiffs have alleged that
15 they would not have purchased the product had they known of the alleged risk—absent allegations
16 that they actually experienced the physical condition as a result of the exposure. *See, e.g. Lassen*
17 *v. Nissan N.A., Inc.*, 211 F.Supp.3d 1267, 1281-82, and fn. 10 (C.D.Cal. 2016). In *Birdsong v.*
18 *Apple Inc.*, 590 F.3d 955 and n.4 (9th Cir. 2009), for example, the Ninth Circuit agreed with the
19 lower court that the plaintiffs lacked Article III and statutory standing, despite allegations in the
20 complaint that “Had Plaintiffs known that the iPod had a defect . . . they would not have purchased
21 the iPod.” *Birdsong v. Apple Inc.*, 2008 WL 7359917, at *2 (N.D.Cal. June 13, 2008), *aff’d*, 590
22 F.3d 955.¹

23 ///

24 _____
25 ¹ *See also, e.g., Contreras v. Toyota Motor Sales U.S.A. Inc.*, 484 F. App’x 116, 118 (9th Cir.
26 2012) (no standing despite plaintiffs’ bare allegation “that they would not have purchased the
27 vehicles had they known of the defect”); *Fisher v. Monster Beverage Corp.*, 125 F. Supp. 3d 1007,
28 1021 (C.D. Cal. 2013), *aff’d in relevant part*, 656 F. App’x 819, 822 (9th Cir. 2016); *Simpson v.*
California Pizza Kitchen, Inc., 989 F. Supp. 2d 1015, 1022 (S.D. Cal. 2013); *Makaryan v.*
Volkswagen Grp of Am., Inc., 17cv5086-PA, 2017 WL 6888254 at*5 (C.D. Cal. Oct. 13, 2017);
Boysen v. Walgreen Co., 11cv06262-SI, 2012 WL 2953069, at *5 (N.D. Cal. July 19, 2012).

1 **C. Plaintiffs’ Alleged Economic Injuries Are Not Traceable to R+F**

2 Plaintiffs do not have standing, either constitutional or statutory, to pursue their omissions
3 claims, because they have not alleged facts to show a causal link between R+F’s alleged omissions
4 and Plaintiffs’ purported economic injuries. *See, e.g. Bates v. United Parcel Serv., Inc.*, 511 F.3d
5 974, 985 (9th Cir. 2007) (for Article III standing, injury must be “fairly traceable” to the
6 challenged action of the defendant); Cal. Bus. & Prof. Code § 17204 (UCL standing requires
7 Plaintiffs’ injury to occur “as a result of” defendant’s misconduct); *id.* § 17535 (same, for FAL
8 standing).

9 Plaintiffs argue that “the Complaint alleges not only that Plaintiffs were exposed to
10 existing disclosures, CC ¶ 109, but also that additional disclosures would have prompted Plaintiffs
11 to behave differently.” Opp. at 17; *see also id.* at 3, 4, 10, 17, 32 (each citing CC ¶ 109). In
12 Paragraph 109, Plaintiffs allege that “all Class Members were exposed to one or another of [the]
13 two warnings.” However, “exposure” does not mean that any class member, let alone Plaintiffs
14 themselves, **actually read** the warnings. Plaintiffs nowhere allege that they read these actual
15 warnings, nor do they say anything about their own review of the labels, websites, or package
16 instructions.

17 Plaintiffs ask the Court to presume causation, arguing that if R+F had directed consultants
18 to warn of alleged side effects, disclosed the side effects online, or used a more “extensive”
19 packaging insert, Plaintiffs “necessarily” and “inevitabl[y]” would have learned of the alleged
20 risks. Opp. at 10 (emphasis in original). These allegations do not appear in the Complaint.
21 Rather, the face of the Complaint suggests the opposite is true: that is, R+F *does* include
22 disclosures online and in its packaging, CC ¶¶ 100, 106–07, but Plaintiffs simply did not read or
23 rely on them. “[F]or Plaintiffs’ [injury] to be caused by [R+F], Plaintiffs must have . . . taken
24 action based on what they saw—in other words, Plaintiffs must have actually relied on
25 the . . . omissions to have been harmed by them.” *Phillips v. Apple Inc.*, 15-CV-04879-LHK, 2016
26 WL 1579693, at *7 (N.D. Cal. Apr. 19, 2016) (collecting cases). Here, Plaintiffs ignored Lash
27 Boost’s existing warnings, so additional warnings could not have made a difference.

28 ///

1 *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051 (N.D. Cal. 2015) is readily distinguishable.
2 There, the plaintiffs alleged that the defendants designed and embedded software on consumers’
3 mobile devices that intercepted and transmitted the consumers’ personal data to the developer and
4 third parties who bought that data. The Court held that, “[w]hile a close issue,” the flurry of media
5 attention and government investigation spurred by news of the defendant’s alleged misconduct
6 made it likely that if the defendants had disclosed their activities earlier, the plaintiffs, as members
7 of the buying public, would have heard about it. *Id.* at 1114 (citing, *inter alia*, *Ehrlich v. BMW of*
8 *N.A., LLC*, 801 F. Supp. 2d 908, 920 (C.D. Cal. 2010)). Plaintiffs, by contrast, make no
9 allegations to support a conclusion that even if they did not read the Lash Boost warnings, they
10 would have learned of the alleged side effects through the news or similar public sources. *See also*
11 *Ehrlich*, 801 F. Supp. 2d at 920 (“the FAC is devoid of allegations that Plaintiff would have
12 plausibly been aware of the . . . defect before he purchased his MINI had BMW publicized this
13 information.”).

14 Plaintiffs ask the Court to excuse their failure to allege that they reviewed Lash Boost’s
15 disclosures, arguing that they “would have remained unaware of those side effects *whether or not*
16 they had read everything R+F said about Lash Boost.” Opp. at 3; *see also id.* at 21. This not only
17 distinguishes this case from *In re Carrier IQ*—it turns causation on its head. If Plaintiffs admit
18 that they did not read the warnings that R+F did give, they cannot claim they would have seen
19 additional information on their product literature. Their own admission, not the content of R+F’s
20 packaging, defeats causation.²

21 _____
22 ² *See, e.g. Pardini v. Unilever U.S., Inc.*, 961 F. Supp. 2d 1048, 1060 (N.D. Cal. 2013) (*UCL and*
23 *CLRA*: no standing where plaintiff failed to plead she “ever looked at the nutrition panel” and it
24 was thus “implausible that she was deceived by its lack of disclosures”); *McVicar v. Goodman*
25 *Global, Inc.*, 1 F. Supp. 3d 1044, 1052 (C.D. Cal. 2014) (same); *Williamson v. Reinalt-Thomas*
26 *Corp.*, No. 11-3548, 2012 WL 1438812, at *8–9 (N.D. Cal. Apr. 25, 2013) (same); *Justice v.*
27 *Rheem Mfg.*, 318 F.R.D. 687, 697 (S.D. Fla. Apr. 27, 2016) (*FDUTPA*: plaintiffs could not prove
28 causation on a classwide basis because “many consumers do not review central AC system
product brochures . . . and thus would be unlikely to be exposed to a disclosure of an alleged
defect”); *Community Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 822 (7th Cir. 2018)
(to show proximate cause under the *ICFA*, a “‘plaintiff must actually be deceived by [an]
omission’ . . . [and] cannot rest on vague accusations about inadequate disclosures and resulting
price effects in the marketplace.”); *Gale v. Int’l Bus. Machines Corp.*, 781 N.Y.S.2d 45, 47 (2nd

1 ***D. The Out-of-State Plaintiffs’ Newly Asserted Price Premium Theory Should Be***
2 ***Disregarded***

3 In support of their FDUTPA, ICFA, Chapter 93A, GBL, and CPA claims, the out-of-state
4 Plaintiffs argue that R+F’s alleged omissions caused them to pay a premium for Lash Boost. Opp.
5 at 5, 21, 22, 24, 25, 26. Allegations to support this price premium theory appear nowhere in the
6 Complaint.

7 Plaintiffs rely on Paragraph 117, which states that they “did not receive what they paid for
8 when purchasing Lash Boost.” However, Plaintiffs bought Lash Boost because they wanted
9 longer-looking lashes, and they do not claim that Lash Boost failed to deliver on those
10 expectations. Plaintiffs’ allegation that they received something different than what they expected
11 is conclusory, and *not* the same as claiming that they paid more for Lash Boost than it was actually
12 worth.

13 Plaintiffs have not alleged any facts to support their new theory. For example, they do not
14 allege how much they paid,³ how much Lash Boost is worth, or that the latter exceeds the former.
15 *See, e.g. Frye v. L’Oreal USA, Inc.*, 583 F. Supp. 2d 954, 958 (N.D. Ill. 2008) (“plaintiff alleges
16 that had the presence of lead been revealed, she would not have purchased the lipstick at issue.
17 But she does not allege . . . that she would have purchased cheaper lipstick, or that the lipstick in
18 question had a diminished value because of the lead.”); *DaCorta v. AM Retail Group, Inc.*, 16-
19 CV-01748 (NSR), 2018 WL 557909, at *8 (S.D.N.Y. Jan. 23, 2018) (“In the absence of facts
20 related to the value or the purchased product, or how the product fell short of what it purported to
21 be, the [] Complaint only reflects Plaintiff’s subjective disappointment.”). This court cannot
22 “presume that [Plaintiffs] would spend more for safe [lash conditioner] than [they] would for
23

24 Dep’t 2004) (GBL); *Rodi v. S. New Eng. Sch. of L.*, 532 F.3d 11, 19 (1st Cir. 2008) (requiring
25 reliance under *Chapter 93A*); *Maple v. Costco Wholesale Corp.*, 649 Fed. App’x 570, 572 (9th
26 Cir. 2016) (*Washington CPA*: “To the extent that Plaintiff’s claim challenges . . . the failure to
describe the caffeine and other ingredients as ‘unnatural,’ the claim fails because Plaintiff has not
alleged that he read those parts of the label. Accordingly, he cannot establish causation.”).

27 ³ Plaintiffs’ Opposition cites Paragraph 16 to the contrary (Opp. at 11), but that paragraph
28 merely states the “approximate” cost of Lash Boost, and not what each Plaintiff actually paid.

1 unsafe [lash conditioner],” or “that this difference in price constitutes an economic injury
2 sufficient to confer Article III standing.” *In re Johnson & Johnson Talcum Powder Products*
3 *Mktg., Sales Practices and Liab. Litig.*, 903 F.3d 278, 288–90 (3d Cir. 2018) (“We cannot
4 conclude that we have jurisdiction by presuming that Estrada would pay less for unsafe powder
5 when she fails to even plead as much.”)

6 **III. PLAINTIFFS FAIL TO STATE A CLAIM**

7 **A. Plaintiffs Do Not Satisfy Rule 9’s Heightened Standards**

8 **1. Plaintiffs Do Not Allege the Circumstances of their Alleged Deception**

9 Plaintiffs argue that they “are not required to allege the circumstances of their purchases
10 with particularity.” Opp. at 11. They read Rule 9 too narrowly. Plaintiffs must “set forth *more*
11 than the neutral facts necessary to identify the transaction,” including “the who, what, when,
12 where, and how” of the conduct charged. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th
13 Cir. 2009) (Rule 9(b)’s particularity requirements apply to omissions claims) (citations omitted).
14 They cannot satisfy Rule 9(b) without offering factual details to demonstrate how R+F specifically
15 deceived them.

16 Plaintiffs fail to allege what deceived them (statements online, on Lash Boost packaging,
17 or statements made by R+F’s consultants?); the specific content of those representations and/or
18 names of the consultants who made them; or which statements they found material. Each of these
19 deficiencies provides a separate basis for dismissal. *Kearns*, 567 F.3d at 1125–26 (upholding
20 dismissal under Rule 9(b) where plaintiff failed to specify which alleged misrepresentations she
21 relied on, “when [s]he was exposed” to them, “who made the statement,” and “which ones [s]he
22 found material.”).

23 Plaintiffs argue that Rule 9(b) merely obliges them to plead what disclosures R+F “could
24 have” made, and where. Opp. at 9–10. But this misses the point. Plaintiffs must identify the
25 “representations that [they] relied on to make [their] purchase and that failed to include the
26 allegedly omitted information.” *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1002 (N.D.
27 Cal. 2009). By failing to identify the specific representations they reviewed, they fail to satisfy
28 Rule 9(b). See, e.g. *In re Facebook Advertising Litig.*, No. 5:09-cv-03043, 2010 WL 3341062, at

*10 (N.D.Cal. Aug. 25, 2010) (“Plaintiffs still should be able to identify with particularity at least the specific policies and representations that they reviewed”); *Hall v. Sea World Ent., Inc.*, 3:15-CV-660-CAB, 2015 WL 9659911, at *14 (S.D. Cal. Dec. 23, 2015) (same); *Orshan v. Apple Inc.*, 5:14-CV-05659-EJD, 2018 WL 5858643, at *5 (N.D. Cal. Nov. 6, 2018) (“[Plaintiffs’] allegations do not allow Apple to pinpoint which of its representations (or materials containing omissions) gave rise to the alleged mistaken expectations which underlie Plaintiffs’ theory of deception.”).

2. Plaintiffs Fail to Allege a Plausible Scientific Basis for Their Claim that Lash Boost Causes “Serious Side Effects”

Plaintiffs reflexively assume that, because isopropyl cloprostenate (“ICP,” an ingredient in Lash Boost) and bimatoprost (an ingredient in prescription product Latisse) are both prostaglandin analogs, Lash Boost must cause all the same side effects as Latisse. Plaintiffs’ Opposition, like their Complaint, offers no support for this assumption, but relies solely on articles concerning bimatoprost and other prostaglandins. Plaintiffs’ Opposition makes several inaccurate assertions:

- “*The FDA has noted that [ICP], like other prostaglandin analogs, has serious side effects.*” Opp. at 12; *see also id.* at 4. This is not true. The letter merely states that there may be “potential adverse events associated with prostaglandin analogs for ophthalmic use.” These statements are not scientific findings as to ICP. *See* Motion at 6.
- “*Scientists have found that [ICP] has serious side effects.*” Opp. at 2–3. Plaintiffs do not cite a single authority to support this claim. Nor do they actually “*allege—with support from the literature—that all prostaglandin analogs cause the same [] side effects.*” Opp. at 12 (citing CC ¶¶ 5, 87 & n.5); *see also id.* at 3–4 (citing ¶ 89 n.41, 91). Each of the articles cited by Plaintiffs concerns glaucoma medication applied directly onto the eye.⁴ They say nothing of ICP or Lash Boost.

Plaintiffs’ focus on the ingredient ICP itself, rather than on Lash Boost, is likewise a distraction. None of the Plaintiffs claim to have applied ICP by itself. They only applied Lash

⁴ The articles cited in paragraph 5 and 87 are titled “Medication Review: Prostaglandin Analogs for Glaucoma” and “Prostaglandin Analogs in the Treatment of Glaucoma.” Similarly, the case report cited in footnote 41 concerns only “prostaglandin medications in the treatment and management of glaucoma.”

1 Boost. Plaintiffs argue that Lash Boost must be dangerous because ICP is dangerous, Opp. at 12–
2 13 & n.4, but a host of cases have dismissed complaints where products contained a purportedly
3 dangerous ingredient but failed to allege facts showing that the product itself creates an
4 appreciable risk of injury. *See, e.g. Herrington v. Johnson & Johnson Consumer Cos.*, 09cv1597-
5 CW, 2010 WL 3448531 *8 (N.D. Cal. Sept. 1, 2010) (carcinogens in baby products); *Boysen v.*
6 *Walgreen Co.*, 11cv06262 SI, 2012 WL 2953069, at *5 (N.D. Cal. July 19, 2012) (arsenic and
7 lead in fruit juice); *In re Fruit Juice Prods.*, 831 F.Supp.2d 507, 512 (D.Mass.2011) (same); *Frye*
8 *v. L’Oreal USA, Inc.*, 583 F. Supp. 2d 954 (N.D. Ill. 2008) (lead in lipstick); *Leppert v. Champion*
9 *Petfoods USA Inc.*, Case No. 18 C 4347, Dkt. 33 at *12, 20–21 (N.D. Ill. Jan. 16, 2019)
10 (“Plaintiffs’ allegations that the mere presence of heavy metals and BPA in [pet food] renders
11 these products ‘unsafe’ is mere speculation”).

12 ***B. The California Plaintiffs Fail to State a Claim***⁵

13 **1. R+F Did Not Fail to Disclose Anything It Had a Duty to Disclose**

14 Plaintiffs recognize that R+F warns Lash Boost customers that irritation may occur. Opp.
15 at 16. They ignore R+F’s warnings about “significant irritation,” “swelling,” “styes,” and
16 “irregularities in appearance of lashes,” and contend that consumers would “reasonably conclude
17 that the product was safe and non-irritating.” Motion at 5 (citing ¶¶ 107, 113). This makes no
18 sense, and ignores the common experience of women who know that virtually any cosmetic can
19 cause irritation under some circumstances.⁶

20 Plaintiffs have not alleged facts supporting a duty to disclose other side effects, because
21 they do not adequately allege that Lash Boost causes those side effects. *Corral v. Carter’s Inc.*,

22 ⁵ Plaintiffs’ Opposition does not argue that they have stated a claim under the “unlawfulness” or
23 “unfairness” prongs of the Unfair Competition Law. For the reasons stated in R+F’s Motion,
24 those claims should be dismissed. *See* Motion at 17.

25 ⁶ The existence of consumer complaints does not “suggest[] that reasonable consumers did not
26 expect serious side effects.” Opp. at 17. Anyone could be unhappy about experiencing eye
27 irritation—whether or not they knew it was possible. Plaintiffs also argue that customers would
28 not expect side effects because R+F presents itself as a “source of trusted information.” Opp. at
17; *see also id.* at 4. This, similarly, has nothing to do with whether reasonable consumers would
understand that a product applied in the eye area may, in some instances, cause irritation. *See also*
Motion at 15–16.

1 1:13-CV-0262 AWI, 2014 WL 197782 at *4 (E.D. Cal. Jan. 16, 2014); *see also Leppert v.*
2 *Champion Petfoods USA Inc.*, Case No. 18 C 4347, Dkt. 33 at *20-21 (N.D. Ill. Jan. 16, 2019)
3 (agreeing that the plaintiffs’ fraud claims must fail because “without pleading what levels of heavy
4 metals and/or BPA are considered safe for pets, Plaintiffs cannot establish that [defendant pet food
5 manufacturer] made misrepresentations or failed to disclose any relevant information.”)

6 Moreover, they fail to explain why side effects that they did not experience, and will not
7 experience, are material to them. *Compare* Opp. at 16 n.6 (“R+F does not challenge materiality.”)
8 *with* Motion at 15 (citing *Herrington*, 2010 WL 3448531 *8).

9 Rather than focusing on Lash Boost, Plaintiffs argue that R+F should have disclosed risks
10 associated with ICP or prostaglandins more generally. For example, the first sentence of the
11 Opposition criticizes R+F for failing to “disclose that Lash Boost’s active ingredient is a
12 prostaglandin analog, a type of chemical that is known to produce serious side effects” Opp.
13 at 2. But as shown above, Plaintiffs have not shown that Lash Boost causes these side effects.
14 Plaintiffs thus stand in no different position than the plaintiff in *Herrington*, who failed to show
15 that formaldehyde in infant shampoo causes illness, or the plaintiffs in *Boysen* and *In re Fruit*
16 *Juice*, who failed to allege plausible facts showing that lead and arsenic in fruit juice is unsafe.
17 *See* pp. 7-8, *supra*; *see also* Motion at 16.

18 Plaintiffs argue that R+F’s warnings about irritation are insufficient because “they do not
19 disclose that the irritation is an *inherent side effect* of Lash Boost’s active ingredient.” Opp. at 15
20 (emphasis added); *see also id.* at 2 (suggesting that Lash Boost “routinely harms its users’
21 bodies”); *id.* at 4 (“irritation is a known side effect”). The Complaint makes no allegations to
22 support this assertion, nor could it. The Complaint only describes the alleged side effects as
23 “possible side effects.” *See, e.g.* CC ¶ 30; *see also id.* ¶ 88 (alleging that products containing
24 prostaglandins “*can* cause redness in the eyes”) (emphasis added). Even the warnings for Latisse,
25 which Plaintiffs argue R+F should emulate, state that Latisse “may cause” side effects. *Id.* ¶ 98.

26 **2. Plaintiffs Fail to Allege Facts Showing that R+F Acted with Scienter**

27 In its Motion, R+F argued that Plaintiffs fail to allege “facts—as opposed to conclusory
28 assertions—that [R+F was] aware of or had any reason to know of [the other alleged side effects]

1 at the time of sale.” Motion at 16 (quoting *Smith v. LG Elecs.*, No. C 13-4361 PJH, 2014 WL
2 989742, at *11–12 (N.D. Cal. Mar. 11, 2014)). In response, Plaintiffs again rely on the 2011
3 Lifetech letter, and articles concerning different products and ingredients. Opp. at 18. These
4 products do not support Plaintiffs’ claim that R+F had knowledge of such side effects at the time
5 of Plaintiffs’ purchases. Indeed, these articles do not, even now, demonstrate that Lash Boost
6 causes serious side effects. Plaintiffs also do not offer support for their conclusory allegation that
7 R+F saw the handful of customer complaints cited in the Complaint. Opp. at 5, 18.

8 **3. Plaintiffs Fail to Allege that They Lack an Adequate Remedy at Law,**
9 **Thus Requiring Dismissal of Their UCL and FAL Claims**

10 Plaintiffs argue that at the pleadings stage, they need not allege that they lack an adequate
11 remedy at law. Opp. at 19–20. The California Court of Appeal has implicitly rejected this
12 argument by dismissing at the pleadings stage a plaintiff’s request for equitable relief under the
13 UCL. *Prudential Home Mortg. v. Superior Court*, 66 Cal. App. 4th 1236, 1250 (1998). (“[W]e
14 must assume the statutory remedies are adequate, thus precluding equitable relief under the
15 Business and Professions Code.”). This District’s decision in *Mullins v. Premier Nutrition Corp.*
16 is also instructive. No. 13-CV-01271-RS, 2018 WL 510139, at *4 (N.D. Cal. Jan. 23, 2018)
17 (currently on appeal). Similar to Plaintiffs here, the plaintiff in *Mullins* argued that “[b]ecause the
18 UCL and the CLRA expressly provide a statutory right to restitution regardless of what other
19 remedies may or may not be available . . . a plaintiff seeking relief under those statutes is not
20 required to plead an inadequate remedy at law [and] that proof of inadequate remedy at law is not
21 required to obtain relief under the UCL.” *Id.* at *3; *see also* Opp. at 19–20. The Court
22 nevertheless dismissed the plaintiff’s claims for equitable relief, explaining that the “cumulative”
23 nature of remedies under the UCL “does not explicitly eliminate or undermine the requirement
24 that equitable remedies are subject to fundamental equitable principles, including inadequacy of a
25 legal remedy.” *Id.* at *3–4 (quoting *Salas v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL
26 7486600*14 (C.D. Cal. Sept. 27, 2016) and also citing *Prudential Home*).⁷

27
28 ⁷ *See also Philips v. Ford Motor Co.*, 2015 WL 4111448, at *16 (N.D. Cal. July 7, 2015);

1 **4. The California Common Law Fraud Claims Fail for Additional**
2 **Reasons**

3 Plaintiffs' Opposition fails to address R+F's arguments that the Complaint does not
4 properly allege justifiable reliance or intent to induce reliance, therefore requiring dismissal of
5 their California fraudulent concealment and negligent misrepresentation claims. *See also* Section
6 II(C), *supra*. Plaintiffs' Opposition also fails to acknowledge R+F's arguments and case law
7 holding that negligent misrepresentation claims cannot rest on an omission, but only on a positive
8 representation. Motion at 19. They do not claim to have relied on any such representation by
9 R+F.

10 The California Plaintiffs' common law claims also fail because Plaintiffs have not alleged
11 any cognizable damage. *See* Section II(D), *supra*. In their Opposition, they claim to have paid
12 "out-of-pocket damages" for Lash Boost because they would not have bought Lash Boost but for
13 R+F's alleged omissions. Opp. at 15. But the "out-of-pocket" measure of damages "is directed to
14 restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction,
15 and thus awards the difference in actual value at the time of the transaction between what the
16 plaintiff gave and what he received." *Alliance Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1240
17 (1995) (quoting *Stout v. Turney*, 22 Cal.3d 718, 725 (1978)). Here, Plaintiffs have not alleged
18 facts to show that they paid more for Lash Boost than its actual value. Out-of-pocket damages are
19 not available.

20 **C. The Out-of-State Plaintiffs Have Not Stated a Claim under Their States'**
21 **Consumer Protection Laws**

22 **1. Huling Has Not Stated a Claim under the FDUTPA**

23 Like the California Plaintiffs, Huling claims to have established damages because "but for
24 R+F's omissions, [she] would not have purchased Lash Boost." Opp. at 21. This purported injury
25 *Munning v. The Gap, Inc.*, 2017 WL 2377867, at *2 (N.D. Cal. June 1, 2017); *Moss v. Infinity Ins.*
26 *Co.*, 197 F. Supp. 3d 1191, 1203 (N.D. Cal. 2016); *Robinson v. C.R. Bard, Inc.*, 2016 WL
27 3361825, at *3 n.3 (N.D. Cal. June 17, 2016); *Gardner v. Safeco Ins. Co.*, 2014 WL 2568895, at
28 *7 (N.D. Cal. June 6, 2014); *Rhynes v. Stryker Corp.*, 2011 WL 2149095, at *4 (N.D. Cal. May
31, 2011); *Summit Estate, Inc. v. Cigna Healthcare of CA, Inc.*, 2017 WL 4517111, at *12 (N.D.
Cal. Oct. 10, 2017); *Nguyen v. Nissan N. Am.*, 2017 WL 1330602 *5 (N.D. Cal. Apr. 11, 2017).

1 is not actionable under the FDUTPA. *See, e.g., Lombardo v. Johnson & Johnson Consumer Cos.*,
2 124 F. Supp. 3d 1283, 1290 (S.D. Fla. 2015).

3 Two cases cited by Plaintiffs—*Hill v. Hoover Co.*, 899 F. Supp. 2d 1259, 1264-65 (N.D.
4 Fla. 2012) and *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990 (Fla. 5th Dist. App. 2004)
5 (cited in Opp. at 21)—do not say otherwise, as those cases involved products that were allegedly
6 worth less than the amount paid. Here, Huling does not raise a price premium theory in the
7 Complaint. *See* Section II(D), *supra*. Rather, she received exactly what she paid for: a lash
8 conditioning serum that made her eyelashes appear longer. She asks the Court to read a price
9 premium theory into the Complaint, arguing that it is not “speculative” to “allege that a cosmetic
10 that causes serious side effects is worth less than one that does not.” Opp. at 21. However, the
11 applicable standard is whether she has alleged facts to satisfy Rules 8 and 9. She has not.

12 Huling does not respond to R+F’s argument that she has failed to allege that a reasonable
13 consumer “in the same circumstances” would be deceived. Motion at 20 (citing *Cold Stone*
14 *Creamery, Inc. v. Lenora Foods I, LLC*, 332 F. App’x 565, 567 (11th Cir. 2009)).

15 2. Whetsell Has Not Stated a Claim under the ICFA

16 Whetsell recognizes that, to state a claim under the IFCA, she cannot just allege “that [she]
17 would not have purchased the product but for [R+F’s] deceptive practice.” Opp. at 22; *see also*
18 Motion at 21. Her Opposition reframes her alleged injury, arguing for the first time that “Lash
19 Boost was worth less than Plaintiff Whetsell paid.” Opp. at 22. Whetsell’s claim fails for the
20 reasons stated in Section II(D) above. *See also Sabo v. Wellpet LLC*, 250 F. Supp. 3d 332, 334
21 (N.D. Ill. 2017) (plaintiff failed to allege that he paid an actual premium for pet food products that
22 were allegedly falsely advertised as being “Made in the USA”).

23 In the alternative, Whetsell claims (also for the first time) that she “paid a higher price for
24 Lash Boost than she would have if R+F had disclosed Lash Boost’s serious side effects.” Opp. at
25 22 (citing CC ¶ 386, 117). This theory is nothing more than a variation on the theme that she
26 would not have purchased Lash Boost at all. *See, e.g. Burkhart v. Wolf Motors of Naperville, Inc.*
27 *ex rel. Toyota of Naperville*, 61 N.E.3d 1155, 1161-62 (Ill. Ct. App. 2016) (no damage even
28 though car was being offered for more than the price plaintiff was willing to pay); *DaCorta v. AM*

1 *Retail Group, Inc.*, 16-CV-01748, 2018 WL 557909, at *7–8 (S.D.N.Y. Jan. 23, 2018).
2 Whetsell’s subjective valuation of the product does not establish an injury.

3 Whetsell does not respond to R+F’s arguments that she failed to allege that R+F intended
4 to induce her reliance, or that she failed to allege that the purchase at issue took place in Illinois.
5 *See Avery v. State Farm Mut. Auto. Ins.*, 835 N.E.2d 801, 850 (Ill. 2005) (to state a claim, plaintiff
6 must the allege the defendant’s intent that the plaintiff rely on the deception); 815 Ill. Comp. Stat.
7 Ann. 505/10a (private right of action exists only for transactions that take place “primarily and
8 substantially” in Illinois); *see also* Rule 9(b) (requiring Plaintiff to allege where she was injured).

9 **3. Merle Has Not Stated a Claim under Chapter 93(A)**

10 While Section 93A actions do not always require reliance, a plaintiff must plead it where,
11 as here, the plaintiff asserts a violation of Chapter 93A based on deception. *Mass. Laborers’*
12 *Health & Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 242 n.3 (D. Mass. 1999); *see*
13 *also In re TJX Cos. Retail Sec. Breach Litig.*, 246 F.R.D. 389, 398 (D. Mass. 2007) (“In some
14 cases . . . reliance constitutes an ‘essential link’ in the chain of causation that does have to be
15 proven under Chapter 93A.”). Merle bases her claim on a fraudulent misrepresentation. (She does
16 not dispute R+F’s argument that she has no claim based on unfairness.) Motion at 23. Merle’s
17 claim therefore fails based on her failure to allege reasonable reliance. *Rodi v. S. New Eng. Sch. of*
18 *L.*, 532 F.3d 11, 19 (1st Cir. 2008); *Edlow v. RBW, LLC*, 688 F.3d 26, 39 (1st Cir. 2012).

19 As to injury, the cases cited by Merle say that a plaintiff may establish economic injury by
20 alleging that a product “did not deliver the full anticipated and advertised benefits, and therefore
21 were worth less, as used or owned, than what the plaintiffs had paid.” Opp. at 23–24 (quoting
22 *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 54 N.E.3d 1106, 1112 (Mass. 2016) and citing
23 *Ferreira v. Sterling Jewelers, Inc.*, 130 F. Supp. 3d 471, 479 (D. Mass. 2015)). But Merle does
24 not claim that Lash Boost failed to make her eyelashes more beautiful, or was otherwise worth less
25 than what she paid. *See In re Fruit Juice Prods.*, 831 F.Supp.2d at 512 (“Because Plaintiffs are
26 unable to show that *any* actual harm resulted from consumption of the fruit juice products [that
27 allegedly contained lead], their allegation of ‘economic’ injury lacks substance.”).

28 ///

1 In a footnote, Merle claims that R+F had a duty to disclose any “material facts known to
2 [it] at the time of a transaction.” Opp. 23 at 9 (citing *Underwood v. Risman*, 605 N.E.2d 832, 835
3 (Mass. 1993)). However, the side effects alleged—which Merle does not claim to have
4 experienced, and which she does not causally attribute to Lash Boost—are not material. *See, e.g.*
5 *Herrington*, 2010 WL 3448531, at *8.

6 4. Hufnagel, Gattuso, and Wagner Do Not State a New York GBL Claim

7 In the Complaint, the New York Plaintiffs claim to have been damaged because they
8 would not have bought Lash Boost if they had known of the alleged side effects. Their Opposition
9 abandons this theory. *See also* Motion at 24-25. Now, they purport to rely on the Opposition’s
10 price premium theory. Opp. at 25. As discussed in Section II(D), this claim should be rejected.
11 *See also, e.g. Izquierdo v. Mondelez Int’l, Inc.*, No. 16-CV-04697 (CM), 2016 WL 6459832, at *7
12 (S.D.N.Y. Oct. 26, 2016) (“Simply because Plaintiff[] here recite[s] the word ‘premium’ multiple
13 times in [her] Complaint does not make [her] injury any more cognizable.”); *Weiner v. Snapple*
14 *Beverage Corp.*, No. 07 CIV. 8742 DLC, 2011 WL 196930, at *3 (S.D.N.Y. Jan. 21, 2011)
15 (plaintiffs must “allege sufficient facts to show that they in fact paid a premium”); *Gomez-Jimenez*
16 *v. N.Y. Law Sch.*, 36 Misc. 3d 230, 246 (Sup. Ct. N.Y. Cty. 2012) (finding the measure of damages
17 to be too speculative).⁸

18 Plaintiffs do not dispute that causation is required under the GBL. They misinterpret
19 R+F’s causation argument (*see* Section II(C), *supra*), and cite cases concerning the amount of
20 detail required to establish causation for an omissions claim. *See, e.g.* Opp. at 25 (citing *Catalano*
21 *v. BMW of N. Am., LLC*, 167 F. Supp. 3d 540, 562 (S.D.N.Y. 2016)). *Woods v. Maytag Co.*, 807
22 F. Supp. 2d 112, 129, 117 (E.D.N.Y. 2011) does not discuss causation or reliance, but the plaintiff
23 there expressly alleged reliance on the defendant’s representations. *In re Porsche Cars N. Am.,*
24 *Inc.*, 880 F. Supp. 2d 801, 860 (S.D. Ohio 2012) is an irrelevant products liability case.

25 ⁸ Plaintiffs’ reliance on *Goldemberg* is misplaced. A price premium existed in *Goldemberg*
26 because plaintiffs alleged that they “would not have paid a premium for [those] unnatural
27 products.” *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 472 (S.D.N.Y.
28 2014). “The operative fact was that a premium was paid because the product was marketed as
natural, when in reality it was not.” *DaCorta*, 2018 WL 557909, at *9. Plaintiffs do not allege
any such facts here.

1 Finally, Plaintiffs also fail to allege the location of their purchases. *Goshen v. Mut. Life*
2 *Ins. Co. of New York*, 98 N.Y.2d 314, 325 (2002) (“our General Business Law analysis does not
3 turn on the residency of the parties”).

4 **5. Williams Has Not Stated a Claim under the Washington CPA**

5 Plaintiff Williams’ new price premium theory should be rejected out-of-hand. Opp. at 26;
6 Section II(D), *supra*. As to causation, Williams is wrong that alleging that R+F failed to disclose
7 material information is, in itself, enough to satisfy her pleading burden. Opp. at 26; *see also*
8 Section II(C), *supra*. The “rebuttable presumption” discussed in *Deegan v. Windermere Real*
9 *Estate/Center-Isle, Inc.*, only applies “in franchise fraud and securities fraud cases.” 391 P.3d 582,
10 587–88 (Wash. Ct. App. 2017) (footnotes omitted).

11 Williams does not purport to have stated a claim for unlawfulness. *See* Motion at 26.

12 **6. Plaintiffs Fail to State Common Law Claims under Florida,**
13 **Massachusetts, New York, Washington, or Illinois Law**

14 The out-of-state Plaintiffs dedicate a short paragraph to respond to R+F’s three pages of
15 arguments as to why they have failed to state common law claims. This paragraph merely asserts,
16 in conclusory fashion, that they have alleged all elements of their claims and satisfied Rule 9.
17 Opp. at 26. As discussed above, Plaintiffs have failed to make any of these requisite showings.

18 Plaintiffs ignore R+F’s state-specific arguments, including that the Washington and Florida
19 negligent misrepresentation claims fail because Plaintiffs do not claim to have relied on any
20 affirmative misrepresentation; that the economic loss doctrine bars claims under Illinois and
21 Washington law for negligent misrepresentation; and the Florida and Illinois negligent
22 misrepresentation claims additionally fail because the Complaint does not adequately allege that
23 R+F intended to induce reliance. *See* Motion at 28–29.

24 **IV. PLAINTIFFS CANNOT SALVAGE THEIR RICO CLAIM**

25 Plaintiffs’ Opposition exposes their RICO claim as nothing more than a common law fraud
26 claim, adorned with a paper-thin allegation about an “enterprise,” half of which—R+F’s
27 consultants—Plaintiffs admit are completely innocent. Courts have routinely rejected similar
28 efforts to bootstrap conventional fraud claims into RICO claims by alleging that an ordinary

1 commercial relationship is a criminal enterprise. *See, e.g., Gomez v. Guthy-Renker, LLC*, Case
2 No. EDCV 14-01425 JGB (KKx), 2017 WL 4270042, at *8 (C.D. Cal. July 13, 2015) (“Courts
3 have overwhelmingly rejected attempts to characterize routine commercial relationship as RICO
4 enterprises.”) (collecting cases). Plaintiffs’ RICO claim also fails for the same reasons as their
5 other fraud claims: they have alleged no injury, no reliance on any misrepresentation or omission,
6 and have not otherwise shown that R+F and its consultants (or anyone else) engaged in a scheme
7 to defraud them through the wires or mails.

8 **A. Plaintiffs’ New Overpayment Theory Cannot Establish Standing under RICO**

9 Plaintiffs’ Complaint does not clearly state whether Plaintiffs’ RICO injury is that they
10 paid too much for Lash Boost, or that they spent any money at all. Motion at 29. Neither theory
11 supports their standing here. Courts have rejected total payment theories as too speculative in the
12 RICO context, and have rejected overpayment theories where plaintiffs fail to allege facts to
13 demonstrate the existence of specific price premiums. *Id.* at 30.

14 Plaintiffs now argue that they did allege a price premium—namely, “\$150—the retail
15 purchase price of the product.” Opp. at 28. Plaintiffs have not alleged that they paid this price,
16 nor have they alleged that Lash Boost is actually worthless, or that it fails to beautify eyelashes as
17 advertised. Plaintiffs cite to the *Ecodiesel* opinion as supporting this total price-price premium
18 theory. But that case merely stands for the proposition that plaintiffs who allege a specific *part* of
19 the overall price of the good was attributable to fraud have standing under RICO. It never
20 suggests that plaintiffs can satisfy RICO’s standing requirements by claiming to have overpaid in
21 an amount equal to the total price paid for the good. To the contrary, *Ecodiesel* suggests that such
22 a theory would be too speculative. *See In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales*
23 *Practices, & Prods. Liab. Litig.*, 295 F. Supp. 3d 927, 962–63 (N.D. Cal. 2018). Plaintiffs’
24 citation to *Cohen v. Trump*, 303 F.R.D. 376 (S.D. Cal. 2014) is similarly unavailing. That case
25 involved a RICO claim seeking full refunds for students of Trump University, on the contention
26 that the classes offered by Trump University were, in fact, worthless. *Id.* at 388.⁹

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28 ⁹ The court in this opinion also did not consider RICO standing—rather, the opinion was on

1 Because Plaintiffs cannot identify, with any specificity, the amount they allegedly overpaid
2 for Lash Boost, they have failed to plead a concrete injury sufficient to establish standing under
3 RICO. *See Ecodiesel*, 295 F. Supp. 3d at 963.

4 ***B. Plaintiffs Have Not Shown Proximate Causation***

5 Plaintiffs argue they need not allege reliance to prove causation under RICO. Yet
6 Plaintiffs must still identify some causal linkage between their claimed injury and R+F's alleged
7 scheme to defraud. For example, courts have permitted RICO plaintiffs to show causation
8 inferentially, such as "where the behavior of plaintiffs and the members of the class cannot be
9 explained in any way other than reliance upon the defendant's conduct." *In re Countrywide Fin.*
10 *Corp. Mortg. Mktg. & Sales Practices Litig.*, 277 F.R.D. 586, 603 (S.D. Cal. 2011); *see also*
11 *Garner v. Healy*, 184 F.R.D. 598, 602 (N.D. Ill. 1999) (inferring reliance where the plaintiffs
12 "paid money for a 'wax,' but instead received a worthless 'non-wax' product"); *Kennedy v.*
13 *Jackson Nat'l Life Ins. Co.*, No. C 07-0371 CW, 2010 WL 2524360, at *8 (N.D. Cal. June 23,
14 2010) (inferring reliance where product offered had no benefit in relation to its cost). But
15 Plaintiffs nowhere allege that the only reason they purchased Lash Boost, or paid a premium for it
16 (whatever that might be), was because R+F omitted alleged side effects from its marketing
17 materials. Nor would such allegations be plausible absent factual allegations that disclosing the
18 alleged side effects would make Lash Boost cost less or be worthless to consumers.

19 Plaintiffs nonetheless assert they have pled enough to establish *proximate* causation
20 because they would not have purchased Lash Boost "but for the omission" Opp. at 28. Yet
21 "but for" and proximate causation are two different things, both of which must be pleaded to
22 establish standing to assert a RICO claim. *See Countrywide*, 277 F.R.D. at 603 ("Absent reliance,
23 Plaintiffs still must prove that Countrywide's conduct was *both* the "but for" and proximate cause
24 of their injuries.") (emphasis added). Even if Plaintiffs have alleged omissions that are the "but
25 for" cause of their injury (and that much is doubtful, *see* Section II(C) above) Plaintiffs have not

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28 class certification, and so evaluated only whether Plaintiffs' damages theory was consistent with
his liability theory. *See Cohen*, 303 F.R.D. at 388.

1 alleged how the purported scheme proximately caused them to purchase Lash Boost or pay more
2 for it, either by inducing their reliance or causing their purchases in some other plausible manner.

3 ***C. Routine Commercial Activity Is Not a Criminal Enterprise***

4 Plaintiffs acknowledge that to plead a RICO enterprise, they must “plausibly allege that
5 two or more individuals had the common purpose of increasing sales of Lash Boost through
6 fraudulent means.” Opp. at 30. But by the allegations of the Complaint, one half of the alleged
7 “enterprise”—the consultants—were unaware of the alleged fraudulent scheme, and thus cannot
8 have had a common purpose to defraud. See CC ¶¶ 387, 393, 395. Plaintiffs argue that this does
9 not matter, because the consultants and R+F enjoy a “strong relationship[.]” Opp. at 30. But
10 courts have repeatedly rejected this exact pleading ploy—transforming business partners engaged
11 in ordinary commercial activity into a RICO enterprise by alleging their relationship is “strong,”
12 despite no evidence of an underlying criminal purpose. See, e.g., *Gomez*, 2015 WL 4270042 *6
13 (“Using this pleading strategy, [plaintiffs’] counsel can construct a novel ‘enterprise’ out of
14 nothing more than the allegation that Provider provides services to Business; it just requires
15 elaborating verbosely on what a Servicer/Client relationship means.”); *Robins v. Global Fitness*
16 *Holdings, LLC*, 838 F. Supp. 2d 631, 652–53 (N.D. Ohio 2012) (“Because it is undisputed that the
17 payment processors provided ordinary wire transfers to [Defendant], ignorant of any fraudulent
18 scheme, Plaintiffs cannot establish they were members along with [Defendant] of an associated-in-
19 fact enterprise under RICO.”); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 400 (7th Cir.
20 2009) (“[Plaintiff] has done no more than describe the ordinary operation of a garden-variety
21 marketing arrangement between Golden Rule and the Federation.”).

22 Plaintiffs argue that cases rejecting RICO claims on this basis are really just cases
23 involving parties that were not in sufficiently close relationships. But this is a red herring. The
24 relevant inquiry is whether the parties to the relationship have a common purpose to commit fraud,
25 or, by contrast, simply to conduct routine commercial activity. Indeed, even where the business
26 partner knows of the fraud, this has been held insufficient to support RICO liability if the
27 relationship between the parties was still a purely commercial one. See, e.g., *Jubiler v.*
28 *MasterCard International*, 68 F. Supp. 2d 1049 (W.D. Wisc. 1999) (“[T]he law is clear that

1 merely having a business relationship with and performing services for [a fraudulent]
2 enterprise . . . does not support RICO liability This is true even though the service provider
3 knows of the enterprise’s illicit nature”).

4 Aware that they have pleaded themselves out of a viable RICO claim, Plaintiffs alternately
5 argue that an enterprise exists between R+F and its founders, Drs. Rodan and Fields. This theory
6 is manufactured out of whole cloth, and has no foundation in the Complaint or in reality. The
7 paragraphs of the Complaint cited for support—119 and 252—merely establish that R+F is proud
8 to have been founded by doctors. Neither paragraph supports an inference that R+F and Drs.
9 Rodan and Fields have formed a criminal enterprise. Indeed, Plaintiffs do not allege that Drs.
10 Rodan and Fields have any significant participation in the development, marketing, or sale of Lash
11 Boost, much less that their involvement rises to a level of constituting a RICO enterprise.

12 ***D. Plaintiffs Fail to Allege a Scheme to Defraud***

13 Plaintiffs concede that omissions cannot form the basis for a scheme to defraud under the
14 mail or wire fraud statutes absent a duty to disclose. Rather, they claim such a duty exists because
15 R+F made “affirmative misrepresentations and misleading half-truths about Lash Boost.” Opp. at
16 32. This is assertion contradicts what Plaintiffs claim throughout the rest of their opposition—
17 namely, that they are proceeding on a fraudulent omission theory and thus need not allege reliance
18 on affirmative statements. And in any event, Plaintiffs do not identify these alleged
19 misrepresentations or half-truths, or explain how they give rise to a duty to disclose.

20 Plaintiffs likewise fail to tie the alleged fraud to any specific use of the wires or mails.
21 Plaintiffs argue that they need only show the use of the mails or wires is “essential” to the
22 fraudulent scheme, not that it contains any fraudulent statement or omission. But Plaintiffs have
23 not shown as much. The only specific use of the wires or mails—other than public marketing
24 statements they do not claim to have seen or relied on—consist of an email to Plaintiff
25 Buckingham confirming her purchase, and the shipment of Lash Boost itself. These are not
26 essential to any scheme because they occurred *after* Plaintiff Buckingham made her decision to
27 purchase the product.

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1 Nor have Plaintiffs identified anything about R+F’s marketing and sale of Lash Boost that
2 supports an inference of specific intent to defraud. *See also* Section III(B)(2), *supra*. Plaintiffs
3 point to literature they claim shows that prostaglandin analogs are associated with certain side
4 effects, but none of these relate specifically to isopropyl cloprostenate or to Lash Boost. Nothing
5 else about R+F’s alleged activity—marketing and selling a cosmetic—takes it out of the realm of
6 “transactions that are facially legitimate,” or supports an inference of intent to defraud. *Eclectic*
7 *Properties*, 751 F.3d 990, 997–98 (Ninth Cir. 2014). Plaintiffs were required to plead, with a
8 “significant level of factual specificity,” why R+F, “act[ing] as a routine participant[] in American
9 commerce,” *id.*, has perpetrated a RICO scheme. They have failed to do so.

10 **V. THIS COURT SHOULD DENY LEAVE TO AMEND**

11 Leave to amend may be denied where any amendment would be futile. *Foman v. Davis*,
12 371 U.S. 178, 182 (1962). A proposed amended complaint is futile if it would immediately be
13 subject to dismissal. *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir. 2011). Here, Plaintiffs’
14 Opposition confirms that they have no set of facts which they could plead to salvage their claims.
15 Plaintiffs suffered no legally cognizable injury, and lack standing. They have failed to allege that
16 they relied on any affirmative misrepresentations or omissions. And they have alleged facts that
17 make the existence of a RICO enterprise impossible—namely, that part of the enterprise had no
18 idea what the other part was doing. For these reasons, any proposed amendment would be futile.
19 Plaintiffs’ complaint should be dismissed with prejudice.

20
21 DATED: January 18, 2019

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By: /s/ Stephanie Sheridan

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